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CAPITAL CASE

No. 86084-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

Vs.

JOSEPH T. McENROE, Petitioner

PETITIONER'S ANSWER TO BRIEF OF AMICUS CURIAE

Kathryn Lund Ross, WSBA No. 6894
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ORIGINAL

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**AMICUS BRIEF IMPROPERLY ADDRESSES ISSUES NOT
BEFORE THIS COURT**

**THE ISSUE BEFORE THIS COURT CONCERNS WHAT A PARTY
MAY OR MAY NOT DO IF A MOTION TO SEAL IS DENIED**

The trial court decided only what will happen if Mr. McEnroe brings a motion to seal documents in relation to the order of the trials and that motion is denied. The trial court held that if a motion to seal is denied LGR 15 will apply and, absent acceptance of interlocutory review, the sensitive documents will be published and not allowed to be withdrawn. That is the only decision of the trial court being reviewed by this Court.

The trial court has not decided whether any documents submitted in relation to the order of trials will be sealed. The trial court has not decided whether or not either co-defendant will be have access to documents sealed at the behest of the other defendant. Issues pertaining to what happens if a motion to seal is granted, raised only by Amicus Anderson, are not properly before this Court and should not be addressed in this review.

**REGARDING WHETHER A PARTY MAY WITHDRAW
SENSITIVE DOCUMENTS IF A MOTION TO SEAL IS DENIED,
AMICUS ANDERSON'S POSITION IN THIS COURT IS THE
OPPOSITE OF WHAT SHE ARGUED BELOW**

Amicus Curiae, Michele Anderson, codefendant to Petitioner

Joseph McEnroe,¹ takes the position here:

Mr. McEnroe should not be permitted to withdraw documents in the event the trial court denies the motion to seal.

Brief of Amicus Curiae, p. 2, and:

Ms Anderson asks this Court to decline Mr. McEnroe's request to allow a party who requests the sealing of documents submitted in support of a motion to withdraw said documents from consideration if the court denies the request to seal.

Brief of Amicus Curiae, p.11. Ms Anderson's position in the trial court was quite different:

We do agree with the co-defendant that the Constitution of the United States requires that a criminal defendant be afforded a mechanism to seek review of any order denying a motion to seal protected documents or to withdraw the protected information from consideration.

Statement of Joinder in Co-defendant's Arguments Supporting his Motion to Waive LGR 15, p. 2.² To the trial court, Anderson echoed Mr.

McEnroe's reasoning:

A criminal defendant, especially in a case where the state is asking for the death penalty should not be forced to choose between her rights to due process and effective counsel and her right to keep attorney-client protected information and work product secret.

Statement of Joinder in Co-defendant's Arguments Supporting his Motion to Waive LGR 15, p. 2.

1

The two cases have been severed for trial.

2

A copy of Anderson's "Statement of Joinder in Co-defendant's Arguments Supporting his Motion to Waive LGR 15" is attached. Mr. McEnroe will file a supplemental designation of clerk's papers to include this pleading.

**AMICUS ANDERSON MERELY REPEATS WHAT HAS BEEN
ARGUED BY THE STATE**

In addition to raising questions regarding the real interest of Amicus, Ms Anderson's arguments against allowing Mr. McEnroe to withdraw documents should sealing be denied duplicate those already made by the State. "Amicus must review all briefs on file and avoid repetition of matters in other briefs." RAP 10.3(e).

**AMICUS ANDERSON IS ASKING THIS COURT TO RULE ON
MATTERS THAT HAVE NOT BEEN PRESENTED TO OR
DECIDED BY THE TRIAL COURT**

In her "Statement of Joinder in Codefendant's Arguments Supporting his Motion to Waive LGR 15...", Appendix A, Anderson advised the trial court:

By joining in these arguments, Ms Anderson is not agreeing that the co-defendant's "Motion to Have his Trial After Michele Anderson's Trial is Complete"³ should be sealed. In fact, in a separate pleading we will argue that the court should, following an in camera review, unseal this pleading (at least in part) as to Ms Anderson so that we can properly respond to Mr. McEnroe's argument that Ms Anderson should "go first."

Anderson "Statement of Joinder" p. 1 - 2, emphasis added. Mr. McEnroe has not yet filed any motion or response regarding the order of the trials because proceedings regarding the order of the trial have been stayed pending this Court's decision on the application of LGR 15 and

interpretation of GR 15. See Commissioner's Ruling Granting Temporary Stay entered June 23, 2011, and the Court's Order granting discretionary review entered July 12, 2011. The trial court has not decided whether any documents will be sealed in regards to arguments on the order of trials. Not having decided whether any materials will be sealed, the trial court has neither heard nor decided whether the codefendant is entitled to discovery of any sealed materials. These issues are not before this Court. Ms Anderson has not filed her promised "separate pleading" in the trial court. Ms Anderson is trying to bypass the trial court hearing and determining the order of the trials and her requests regarding access to any sealed documents.

It seems Amicus Anderson is still pursuing the goal she articulated in her denied "Codefendant Anderson's Motion for Permission to Be Named a Party in Interest and Be Given Permission to File Responsive Pleadings," filed here July 22, 2011. There, Anderson advised this Court she wished to "advanc[e] arguments in support of the position that she be tried second in time." Anderson Motion ... To Be Named a Party", p. 3. Perhaps belatedly realizing this Court will have little interest in supplanting the trial court's authority to determine the order of the trials (which the trial court has not yet done), Anderson now reverses her previous support for Mr. McEnroe and herself to be able to withdraw sensitive documents if sealing is denied in the belief that Mr. McEnroe

will be deterred from pursuing his argument to be tried after Anderson.

Similarly, Anderson expressed concern in her Motion to be named a party that “this Court might fashion a ruling that would prohibit Ms Anderson from requesting the trial court to conduct an in camera review of sealed documents to determine whether Mr. McEnroe is in possession of information that is relevant and material to Ms Anderson’s defense.” Anderson Motion, p. 6. Clearly, Ms Anderson desires this Court now to preempt the trial court deciding whether and under what conditions a motion to seal documents will be granted and to issue an opinion assuring Anderson she will be granted access to Mr. McEnroe’s confidential documents even if they are sealed by the trial court. Ms Anderson may be curious as to Mr. McEnroe’s mitigation strategies but she is also apparently angling to dissuade Mr. McEnroe from supporting his arguments to be tried after her trial out of fear his confidential and privileged information will be disclosed to his co-defendant.

**IF DOCUMENTS ARE WITHDRAWN AND NOT CONSIDERED
BY THE TRIAL COURT FOR ANY SUBSTANTIVE REASON
THERE IS NO REASON THERE MUST BE A RECORD OF THEM**

Anderson argues she “is entitled to a record of sufficient completeness for appellate review.” Amicus brief, p. 10. This does not make sense. If the documents are withdrawn they will not be considered for any reason including the order of trials. As set forth in Mr. McEnroe’s

Reply Brief, there is apparently no record of co-defendants being prejudiced by withdrawn documents in the many years the federal courts and other jurisdictions have been expressly permitting the withdrawal of documents on denial of motions to seal. This is especially germane given the large number of multi-defendant conspiracy and RICO cases processed in federal district courts.

MS ANDERSON HAS NO NEED TO “RESPOND” TO MR. MCENROE’S REASONS THAT HE BE TRIED AFTER HER

Anderson’s only argument to the trial court that she be tried after Mr. McEnroe was that her attorneys are more recent to the case⁴ and need additional time to prepare. Ms Anderson’s concern, therefore, is not whether she is tried before or after Mr. McEnroe but WHEN she is tried. Her arguments as to her readiness for trial do not depend on Mr. McEnroe’s confidential mitigation strategy which would be the subject of any motion to seal on his part.

QUESTIONS OF THE CODEFENDANTS’ DISCOVERY OF EACH OTHER’S SEALED INFORMATION IS A MATTER FOR THE TRIAL COURT

The question of whether a co-defendant has special standing beyond that of the state and public to access another defendant’s

4

Ms Anderson’s newest attorney, Colleen O’Connor, was appointed approximately a year ago and her other attorney, David Sorenson, has been representing her since March 26, 2010. The public defender agency employing both O’Connor and Sorenson has been representing Ms Anderson since August 20, 2008.

confidential information is one that has not been decided below. It is beyond the scope of the review granted here. It is also a significant question that should be fully briefed in the context of the case before the trial court. It is not a matter that should be thrown in the wash by an amicus, especially under the abbreviated time for research and briefing allowed the parties under the accelerated schedule governing this review.

In addition, Ms Anderson's case file is likely a far richer vein of sealed information for Mr. McEnroe to mine should confidentiality between the defendants be dissolved than his file would be for Ms Anderson. Other than routine motions and documents in support of the appointment of investigative and expert services allowed to be brought ex parte and sealed pursuant to CrR 3.1(f)(2), Mr. McEnroe has not yet filed any documents under seal. However, co-defendant Anderson has sought and been granted several motions to seal pleadings and supporting documents in conjunction with her previous motions to change counsel and for competency evaluations. If Ms Anderson is granted access to Mr. McEnroe's sealed or withdrawn documents, Mr. McEnroe would, correspondingly, have the right to seek information which may be relevant to his defense in the previously sealed materials in Ms Anderson's court file, including her entire mitigation package. The trial court would have to closely review Ms Anderson's file for information which might be

useful to Mr. McEnroe.⁵

The trial court has presided over the cases of Mr. McEnroe and Ms Anderson since the beginning. The trial court is in the best position to determine whether any materials submitted by the defendants should be sealed and whether the sealing should be effective in whole or part against the other defendant. It has not yet done so. This Court should not wade into the waters yet to be swum by the trial court.

CONCLUSION

This Court should not consider arguments raised by Amicus Anderson. On the only issue before the Court Ms Anderson has taken contradicting positions in the trial court and this Court and she only repeats arguments already made by the State. The other issues raised by Ms Anderson have not been addressed in the trial court and are not properly before this Court for review.

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While Amicus Anderson speculates that Mr. McEnroe might present something adverse to her should he be granted a motion to seal, Ms Anderson and her counsel have actually sought sealing of letters from Ms Anderson to the trial court in which Anderson erroneously claimed Mr. McEnroe wished to be executed, claimed his counsel were dishonest and incompetent, and falsely claimed his attorneys failed to inspect portions of the crime scene. Prior to the King County Superior Court's amendment of LGR 15 in September, 2010, the trial court granted several of Ms Anderson's motions for sealing which would have to be revisited should Ms Anderson's arguments that there is no confidentiality between co-defendants be accepted.

Dated: November 2, 2011.

Respectfully submitted:

Kathryn Lund Ross, WSBA 6894
Leo Hamaji, WSBA 18710
William Prestia, WSBA 29912
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The Defender Association
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DECLARATION OF SERVICE

True and correct copies of the above document are being mailed this date to counsel for respondent, State of Washington, and co-defendant Michele Anderson, addressed as set forth below. In addition, all counsel are being sent copies of the above pleading through e-mail contemporaneous with the e-filing of the document above.

I declare the foregoing to be true and correct under penalty of perjury under the laws of the State of Washington.

Dated: November 2, 2011, at Seattle, WA.

Kathryn Ross, WSBA No. 6894

Counsel for Respondent:

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KING COUNTY
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
 IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON,

Plaintiff,

V

MICHELE ANDERSON

Defendant

CAUSE NO. 07-1-087172 SEA

STATEMENT OF JOINDER IN CO-
 DEFENDANT'S ARGUMENTS
 SUPPORTING HIS MOTION TO WAIVE
 LGR 15 AND MOTION TO SHORTEN
 TIME, and MOTION TO WAIVE LGR 15
 FOR THE PURPOSE OF FILING
 DEFENDANT'S MOTION TO SEAL THE
 SUPPLEMENTAL DECLARATION IN
 SUPPORT OF DEFENDANT'S MOTION
 TO CONTINUE THE TRIAL DATE AND
 MOTION TO PROCEED TO TRIAL
 AFTER THE CO-DEFENDANT,

STATEMENT OF JOINDER IN ARGUMENTS
SUPPORTING WAIVER OF LGR 15

Ms. Anderson joins in the co-defendant's arguments supporting the waiver of LGR 15, and argues that they should apply with equal force to Ms. Anderson's Motion to Seal the Supplemental Declaration in Support of her Motion to Continue the Trial Date and Motion to Proceed to Trial After the Co-Defendant (Supplemental Declaration).

By joining in these arguments, Ms. Anderson is not agreeing that the co-defendant's Motion to Have his Trial After Michele Anderson's Trial is Complete should be sealed. In fact, in a separate pleading, we will argue that the court should, following an *in camera* review, unseal

1 this pleading (at least in part) as to Ms. Anderson so that we can properly respond to Mr.
2 McEnroe's argument that Ms. Anderson should "go first."

3 We do agree with the co-defendant that the Constitutions of the United States and the
4 State of Washington require that a criminal defendant be afforded a mechanism to seek review of
5 any order denying a motion to seal protected information, or to withdraw the protected
6 information from consideration. If the Court denies a motion to seal and files the documents in
7 the court file, the "cat is out of the bag." Any right of review that a defendant has at that point
8 would be meaningless, since no effective remedy would exist. *cf. Cedell v. Farmers Ins. Co. of*
9 *Washington*, 157 Wash. App. 267, 272, 237 P. 2d 309 (2010) (granting an emergency stay of the
10 trial court's decision, after a hearing, to order disclosure of confidential and privileged
11 information, and citing *Drewett v. Rainier Sch.*, 60 Wash. App. 728, 731, 806 P. 2d 1260 (1991),
12 for the proposition that the Court of appeals reviews a trial court's interpretation of the privilege
13 statutes *de novo*).

14 A criminal defendant, especially in a case where the state is asking for the death penalty,
15 should not be forced to choose between her rights to due process and effective counsel and her
16 right to keep attorney-client protected information and work product secret.

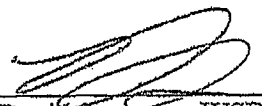
17 Ms. Anderson also joins in the co-defendant's motion for an order shortening time, and
18 separately moves for an order shortening time as it pertains to Ms. Anderson's Motion to Waive
19 LGR 15.

20 MOTION TO WAIVE LGR 15

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22
23 COMES NOW, the defendant, Michele Anderson, by and through her attorneys,
24 Colleen O'Connor and David Sorenson, of the Society of Counsel Representing Accused
25 Persons, and respectfully moves pursuant to the 5th and Sixth Amendment's to the United States
26 Constitution, Article 1 sections 3 and 22 of the Washington Constitution, and the facts set forth
27 in the attached declaration of counsel that the court grant the following relief:
28

- 1) Ms. Anderson moves that the Court waive application of Local General Rule 15 as it applies to Ms. Anderson's Motion to Seal the Supplemental Declaration
- 2) Ms. Anderson moves that the Court consider Ms. Anderson's Motion to Seal the Supplemental Declaration prior to considering her Motion to Continue the Trial Date and Motion to Proceed to Trial After the Co-Defendant.
- 3) If the Court denies Ms. Anderson's motion to seal the Supplemental Declaration, Ms. Anderson moves that the Court--at Ms. Anderson's election-- either allow the defendant to withdraw the Supplemental Declaration from consideration, or refrain from filing the Supplemental Declaration until such time as Ms. Anderson can seek review of the order denying sealing.
- 4) To declare that, as applied, LGR 15 violates the Fifth and Sixth Amendments to the United States constitution, Article I, sections 3 and 22 of the Washington State Constitution, and to find LGR 15 unlawful insofar as it contravenes GR 15.

Respectfully Submitted this 16th day of May 2011.

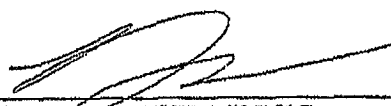

David Sorenson, WSBA #27617
Attorney for the Defendant

DECLARATION IN SUPPORT OF MOTION

- 1) I am the attorney for the defendant, Michele Anderson. Ms. Anderson is also represented by lead counsel Colleen O'Connor. The defendant is charged with 6 counts of Aggravated First Degree Murder. The state is seeking the death penalty in the event of a conviction.

- 1 2) The defense anticipates filing a Motion to Continue Trial and Motion to Proceed
2 to Trial After the Co-Defendant. This motion will be filed on or before the Court-
3 imposed due date of May 19.
- 4 3) In order to adequately and completely set forth the bases for these requests the
5 defense must reveal work product and/or information that is confidential, and/or
6 attorney-client protected. The defense will set this information forth in a
7 Supplemental Declaration in Support of Motion to Continue Trial and Motion to
8 Proceed to Trial After the Co-Defendant. The defense will move that the Court order
9 this Supplemental Declaration to be filed under seal.
- 10 4) If, in conformance with LGR 15, the defense must file the Supplemental
11 Declaration at the same time as the Motion to Seal, and if the Court denies the
12 defendant's motion to seal, LGR 15 mandates that the Supplemental Declaration be
13 filed in the open court file without further right of review. In such a situation, Ms.
14 Anderson would have no right to seek meaningful review of the Court's order
15 denying the motion to seal, since once the Supplemental Motion is filed in the court
16 file, no adequate remedy would exist to protect the information that defendant asserts
17 is confidential, work product, and/or attorney-client privileged.

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19 Respectfully Submitted this 12 day of March, 2011

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22 David Sorenson, WSBA#27617
23 Attorney for Defendant
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